119

No. 08-1050

Supreme Court, U.S.
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In The

Supreme Court of the United States

ALEX BERNARD JOHNSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a guilty plea is involuntary where the trial court did not admonish the defendant of the punishment range for the unenhanced offense and give him the opportunity to withdraw the plea after the State abandoned the enhancement paragraph at the sentencing hearing.

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PETITION FOR A WRIT OF CERTIORARI

Alex Bernard Johnson respectfully petitions this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the 182nd District Court of Harris County are not reported (Appendix A). The orders of the Texas Court of Criminal Appeals denying habeas corpus relief based on the trial court's findings of fact and conclusions of law are not reported (Appendix B).

JURISDICTION

The Texas Court of Criminal Appeals denied habeas corpus relief on December 17, 2008. This petition is being filed within 90 days of that order. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall be . . . deprived of . . . liberty . . . without due process of law. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of liberty . . . without due process of law. . . ."

STATEMENT OF THE CASE

A. Summary Of The Issue

Petitioner pled guilty to aggravated sexual assault, aggravated kidnapping, and aggravated assault in state district court in Texas. Each indictment alleged for enhancement a juvenile conviction for felony theft. He pled guilty to the indictments and true to the enhancement paragraphs without an agreed recommendation on punishment. The trial court admonished him on the punishment range for the enhanced offenses and recessed the proceedings for preparation of a Pre-Sentence Report (PSR) and sentencing.

The PSR reflected that the juvenile conviction alleged for enhancement was a state jail felony. The prosecutor acknowledged at the sentencing hearing that a state jail felony conviction could not be used to enhance first and second degree felonies and abandoned the enhancement paragraphs. The trial court did not thereafter admonish petitioner of the different punishment ranges for the unenhanced offenses or give him the opportunity to withdraw the guilty pleas. It assessed the maximum punishment for each offense.

Petitioner filed state habeas corpus applications alleging that his guilty pleas were involuntary because the trial court did not admonish him of the punishment ranges for the unenhanced offenses and give him the opportunity to withdraw the guilty pleas after the State abandoned the enhancement paragraphs at the sentencing hearing. The trial court concluded that the guilty pleas were voluntary because it only had to admonish petitioner of the punishment ranges for the enhanced offenses before accepting the pleas. The Court of Criminal Appeals denied relief without written order based on the trial court's findings of fact and conclusions of law.

The Texas Court of Criminal Appeals concluded, in essence, that guilty pleas are voluntary even though the trial court failed to admonish the defendant of the punishment ranges for the unenhanced offenses and give him the opportunity to withdraw the pleas after the State abandoned the enhancement paragraphs at the sentencing hearing. This Court should grant certiorari to decide this important federal issue of first impression.

B. Procedural History

Petitioner was charged with aggravated sexual assault in cause number 916099, aggravated kidnapping in cause number 916100, and aggravated assault in cause number 916110 in the 182nd District Court of Harris County. Each indictment alleged for enhancement a juvenile conviction for felony theft. He

pled guilty to the indictments and true to the enhancement paragraphs without an agreed recommendation on punishment before the Honorable Jeannine Barr on January 22, 2003. The trial court recessed the proceedings for preparation of a PSR and sentencing. The State abandoned the enhancement paragraphs during summation at the sentencing hearing. The court found him guilty of each offense and assessed his punishment at life imprisonment for aggravated sexual assault and aggravated kidnapping and 20 years for aggravated assault on April 21, 2003. Dick Wheelan represented him.

The Fourteenth Court of Appeals affirmed the convictions in an unpublished opinion issued on February 26, 2004. Petitioner did not seek discretionary review. *Johnson v. State*, 2004 WL 349929 (Tex. App. – Houston [14th Dist.] 2004, no pet.). Petitioner represented himself after appointed counsel filed a frivolous appeal brief and was allowed to withdraw.

Petitioner filed state habeas corpus applications on April 23, 2008. The State filed proposed findings of fact and conclusions of law on October 29, 2008, which the trial court signed verbatim on that date (Appendix A). The Texas Court of Criminal Appeals denied relief without written order on December 17, 2008. *Ex parte Johnson*, Nos. 70,051-02, 70,051-03, and 70,051-04 (Tex. Crim. App. 2008) (Appendix B).

REASON FOR GRANTING THE PETITION

THE TEXAS COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT, WHEN A TRIAL COURT ADMONISHES A DEFENDANT OF THE PUNISHMENT RANGE FOR AN ENHANCED OFFENSE BEFORE ACCEPTING A GUILTY PLEA, IT NEED NOT ADMONISH HIM OF THE PUNISHMENT RANGE FOR THE UNENHANCED OFFENSE AND GIVE HIM THE OPPORTUNITY TO WITHDRAW THE GUILTY PLEA AFTER THE STATE ABANDONS THE ENHANCEMENT PARAGRAPH AT THE SENTENCING HEARING.

Petitioner and a companion assaulted a man with a deadly weapon on April 10, 2002. They kidnapped and sexually assaulted a woman on June 8, 2002. Charges were filed in all three cases on June 25, 2002. The trial court appointed Dick Wheelan to represent petitioner on June 27, 2002. A grand jury returned indictments on August 21, 2002 (H.R. 26-30). Each indictment alleged for enhancement that petitioner previously had been convicted of felony theft in cause number 2000-04515J in the 314th District Court of Harris County (a juvenile court).

Petitioner pled guilty to the indictments and true to the enhancement paragraphs without an agreed recommendation on punishment on January 22, 2003 (H.R. 31-41). He signed admonishments that the punishment range for aggravated sexual assault and

aggravated kidnapping, enhanced by a prior felony conviction, is 15 to 99 years or life and a fine up to $10,000, and for aggravated assault, enhanced by a prior felony conviction, is five to 99 years or life and a fine up to $10,000 (H.R. 42-70). The trial court recessed the proceedings for preparation of a PSR and sentencing.

The PSR reflected that the juvenile conviction alleged for enhancement was a state jail felony (H.R. 83). The State presented brief testimony at the sentencing hearing on April 21, 2003 (H.R. 110-13). The prosecutor acknowledged during summation that the prior conviction was a state jail felony and abandoned the enhancement paragraphs (H.R. 116). The trial court did not thereafter admonish petitioner of the punishment ranges for the unenhanced offenses and give him the opportunity to withdraw the guilty pleas. It assessed life imprisonment for aggravated sexual assault and aggravated kidnapping and 20 years for aggravated assault (H.R. 119).

Petitioner testified by affidavit in the habeas proceeding that the trial court advised him only of the punishment ranges for the enhanced offenses and that he did not know at the time that a state jail felony juvenile conviction could not be used for enhancement or the punishment ranges for the unenhanced offenses. Had he known the correct punishment ranges, he would not have pled guilty and elected the court to assess punishment. Instead, he would have gone to trial and elected a jury to assess punishment. He explained that he would have

been willing to go to trial if the minimum were five years on unenhanced first degree felonies and two years on the unenhanced second degree felony because, if a jury assessed the minimum and the court cumulated the sentences, he would receive 12 years. He was not willing to risk going to trial if the minimum were 15 years on enhanced first degree felonies and five years on the enhanced second degree felony because, if a jury assessed the minimum and the court cumulated the sentences, he would receive 35 years. Had the trial court advised him that a state jail felony conviction could not be used for enhancement and of the punishment ranges for the unenhanced offenses after the State abandoned the enhancement paragraphs at the sentencing hearing, he would have moved to withdraw the pleas (H.R. 123-25).

Trial counsel, Dick Wheelan, testified by affidavit that he advised petitioner of the punishment ranges for the unenhanced offenses when he was initially appointed in June of 2002 (H.R. 144). He believed that petitioner pled guilty to avoid cumulated sentences (H.R. 146). Petitioner responded by affidavit that, even if Wheelan advised him of the punishment ranges for the unenhanced offenses in June of 2002, he did not remember them at the time that the State abandoned the enhancement paragraphs at the sentencing hearing in April of 2003 (H.R. 154).

The trial court concluded that it must admonish a defendant only of the punishment ranges for the enhanced offenses and that, as a result, petitioner's

guilty pleas were knowing and voluntary (H.R. 156-57). It implicitly concluded that it need not admonish a defendant of the punishment ranges for the unenhanced offenses and give him the opportunity to withdraw his guilty pleas if the State abandons the enhancement paragraphs at the sentencing hearing. The Texas Court of Criminal Appeals denied relief based on the trial court's findings of fact and conclusions of law.

Aggravated sexual assault and aggravated kidnapping are first degree felonies with a punishment range of five to 99 years or life. TEX. PENAL CODE § 12.32 (West 2002). Aggravated assault is a second degree felony with a punishment range of two to 20 years. TEX. PENAL CODE § 12.33 (West 2002). A state jail felony conviction cannot be used to enhance a first degree or second degree felony under section 12.42(e) of the Texas Penal Code. *Fortier v. State*, 105 S.W.3d 697, 701 (Tex. App. – Amarillo 2003, pet. ref'd). Neither the trial court, the prosecutor, nor defense counsel knew at the time petitioner pled guilty that his juvenile conviction was a state jail felony and that, as a result, it could not be used for enhancement. Accordingly, the trial court erroneously admonished petitioner only of the punishment ranges for the enhanced offenses.

The 2002 edition of article 26.13(a)(1) of the Texas Code of Criminal Procedure provided that, before accepting a guilty plea, the trial court shall admonish the defendant of the range of punishment for the offense. Article 26.13(c) provided that substantial

compliance is sufficient unless the defendant affirmatively shows that he was not aware of the consequences of the plea and that he was misled or harmed by the admonishment of the court.

An involuntary guilty plea violates due process of law. U.S. CONST. amends. V and XIV; *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). To comply with the requirements of federal due process, the record must show that the defendant pled guilty with full knowledge of the consequences. *Id.* Voluntariness is determined by considering the circumstances surrounding the plea. *Brady v. United States*, 397 U.S. 742, 749 (1970).

The prosecutor acknowledged that the prior conviction was a state jail felony and abandoned the enhancement paragraphs during summation at the sentencing hearing. Had the trial court admonished petitioner of the punishment ranges for the unenhanced offenses and given him the opportunity to withdraw the guilty pleas, but he persisted in pleading guilty, it would have cured the error in the previous admonishment. However, the trial court, without admonishing him of the punishment ranges for the unenhanced offenses and giving him the opportunity to withdraw the guilty pleas, assessed the maximum punishment for each offense. There was no substantial compliance, and he is entitled to relief. *Gonzales v. State*, 712 S.W.2d 834, 835 (Tex. App. – Houston [14th Dist.] 1986, no pet.) (admonishing defendant of punishment range for offense for first time at sentencing hearing did not constitute substantial

compliance where trial court did not give him opportunity to withdraw guilty plea).

Petitioner would have gone to trial had he known that the minimum was five years on the unenhanced first degree felonies and two years on the unenhanced second degree felony because, if a jury assessed the minimum and the court cumulated the sentences, he would receive 12 years. He was not willing to risk going to trial if the minimum were 15 years on the enhanced first degree felonies and five years on the enhanced second degree felony because, if a jury assessed the minimum and the court cumulated the sentences, he would receive 35 years. Had the trial court advised him that a state jail felony conviction could not be used for enhancement and of the punishment ranges for the unenhanced offenses after the State abandoned the enhancement paragraphs at the sentencing hearing, he would have moved to withdraw the pleas. Thus, he was harmed by the erroneous admonishment.

Whether a trial court that admonished the defendant of the punishment range for the enhanced offense before accepting a guilty plea must admonish him of the punishment range for the unenhanced offense and give him the opportunity to withdraw the plea after the State abandons the enhancement paragraph at the sentencing hearing is an issue of first impression. The decision of the Texas Court of Criminal Appeals that a trial court need not do so is contrary to the principles underlying *Boykin* and *Brady*. This Court should grant certiorari to decide

this important question of federal law that has not been, but should be, settled. SUP. CT. R. 10(c).

CONCLUSION

Petitioner requests that the Court grant the petition for a writ of certiorari, vacate the judgments, and order new trials.

Respectfully submitted,

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Alex Bernard Johnson

NO. 916099-A

EX PARTE ALEX BERNARD JOHNSON, Applicant	§ § § § § §	IN THE 182ND DISTRICT COURT OF HARRIS COUNTY, TEXAS

RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

(Filed Oct. 29, 2008)

Having reviewed the documents filed in cause number 916099-A and the official trial court records of the challenged conviction, the Court adopts as Findings of Fact the history of the case as set forth in Respondent's Original Answer. The Court further finds that the facts asserted in the affidavit of DICK WHEELAN filed in this cause are true and that said facts together with this Court's personal recollection and with the contents of official trial court records and the appellate record in cause number 916099 demonstrate that:

1. On April 21, 2003, Alex Bernard Johnson (Applicant) was convicted pursuant to a guilty plea for the offense of aggravated sexual assault in cause number 916099 and was sentenced to confinement for life in the Texas Department of Criminal Justice – Institutional Division;

2. Attorney Dick Wheelan (Wheelan) represented Applicant in the trial phase of cause number 916099 as well as in the trial phase

related to the offenses of aggravated kidnapping in cause number 916100 and of aggravated assault in cause number 916110;

3. Wheelan informed Applicant about the applicable ranges of punishment for the first degree felony offense of aggravated sexual assault with and without application of the single enhancement paragraph;

4. Wheelan informed Applicant of all of his legal options – which included (a) proceeding to a trial by jury or to the court, (b) entering an open guilty plea to a pre-sentence investigation which allowed the trial court to assess a sentence within the applicable punishment range, (c) pleading guilty to a jury in order for the jury to assess a sentence within the applicable punishment range, or (d) attempting to reach a plea agreement with the State – and the associated consequences for each option;

5. Wheelan informed Applicant that, if he were to plead guilty, the trial court would likely order that his sentences run concurrently, but, if he chose to proceed to trial, the trial court could potentially order that his sentences run either concurrently or consecutively;

6. Wheelan informed Applicant about the evidence contained in the State's prosecution files;

7. Applicant was fully aware of the egregious nature of these offenses and, notwithstanding

the enhancement paragraph, manifested his desire to avoid trial and to plead guilty in all three cases based upon his concerns that (a) he would receive life sentences for the first degree felony offenses and (b) the trial court would order consecutive sentences;

8. Applicant and Wheelan never discussed the likelihood of Applicant receiving minimum sentences either pursuant to a guilty plea or after trial because Applicant understood the egregiousness of the offenses and the likelihood that a jury would convict him and assess sentences that were on the higher end of the punishment range based upon the severity of the offenses;

9. Applicant was aware that, based upon the facts of the offenses, there was no chance that [sic] would receive a sentence at the lower end of the punishment range;

10. The trial court properly admonished Applicant as required by law prior to accepting his guilty plea;

11. The trial court specifically admonished Applicant of the range of punishment for the first degree felony offense of aggravated sexual assault enhanced with one prior felony conviction based upon Applicant's plea of guilty to aggravated sexual assault and plea of true to the enhancement paragraph;

12. The trial court accepted Applicant's guilty plea and recessed the plea proceedings for a pre-sentence investigation to be conducted;

13. Prior to the sentencing hearing, Wheelan became aware that the enhancement paragraph was based upon a juvenile adjudication for a state jail felony offense and that this adjudication was unavailable for enhancement purposes;

14. During the sentencing hearing, the prosecutor abandoned the enhancement paragraph, and the trial court did not find the enhancement paragraph true;

15. Applicant never indicated to Wheelan any interest in withdrawing or any desire to withdraw his guilty plea prior to, during, or after the sentencing hearing;

16. Applicant's guilty plea was knowingly and voluntarily entered; and

17. Applicant has failed to demonstrate that his conviction was improperly obtained or his sentence was improperly assessed.

Accordingly, it is recommended to the Texas Court of Criminal Appeals that the requested habeas relief be denied.

THE CLERK IS ORDERED to prepare a transcript of all papers in cause number 916099-A and transmit same to the Court of Criminal Appeals as provided by TEX. CRIM. PROC. CODE ANN. art. 11.07 § 3 (Vernon Supp. 2007). The transcript shall include certified copies of the following documents:

A. the application for writ of habeas corpus (including all attached exhibits);

B. the Respondent's answer (including all attached exhibits);

C. the Court's order;

D. the indictment (or information), judgment and sentence, and the docket sheets in cause number 916099;

E. the "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession" and trial court's written admonishments in cause number 916099;

F. the appellate record in cause number 916099;

G. the appellate opinion in cause number 916099;

H. Respondent's Proposed Findings of Fact, Conclusions of Law and Order; and

I. Applicant's Proposed Findings of Fact (if any).

THE CLERK is further ORDERED to send a copy of this order to counsel for Applicant, Randy Schaffer, 1301 McKinney, Suite 3100, Houston, Texas 77010; and to counsel for Respondent, Baldwin Chin, 1201 Franklin, Suite 600, Houston, Texas 77002.

By the following signature, the Court adopts the Respondent's Proposed Findings of Fact, Conclusions of Law and Order.

Signed on this ___ day of Oct. 29, 2008.

/s/ Jeanine Barr 10-29-08

HONORABLE JEANINE BARR,
PRESIDING JUDGE, 182ND
DISTRICT COURT HARRIS
COUNTY, TEXAS

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

[POSTMARK DEC. 18, 2008]

RE: Writ No. WR-70,051-03
STYLE: Johnson, Alex Bernard
TRIAL CT NO: 916099-A
12/17/2008

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing.

Louise Pearson, Clerk

Randy Schaffer
1301 McKinney Ste 3100
Houston, TX 77002

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

[POSTMARK DEC. 18, 2008]

RE: Writ No. WR-70,051-04
STYLE: Johnson, Alex Bernard
TRIAL CT NO: 916100-A
12/17/2008

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing.

Louise Pearson, Clerk

Randy Schaffer
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Houston, TX 77002

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

[POSTMARK DEC. 18, 2008]

RE: Writ No. WR-70,051-02
STYLE: Johnson, Alex Bernard
TRIAL CT NO: 916110-A
12/17/2008

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing.

Louise Pearson, Clerk

Randy Schaffer
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